In the Supreme Court of the United States.

OCTOBER TERM, 1899.

OBERLIN M. CARTER, ON THE PETITION of Abram J. Rose, appellant and plaintiff in error,
v.
BENJAMIN K. ROBERTS.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

STATEMENT.

The appellant and plaintiff in error was, prior to the 29th day of September, 1899, a captain of the United States Army, assigned to the Corps of Engineers. He was arraigned and tried before a court-martial in Savannah, Ga., convened according to law, upon the following charges, viz:

CHARGE I. Conspiracy to defraud the United States, in violation of the Sixtieth Article of War (being article

60, under section 1342, Revised Statutes), and upon which there was a finding of guilty to the general charge, and also with certain amendments to the second specification thereof.

CHARGE II. For causing false and fraudulent claims to be made against the United States, in violation of the said Sixtieth Article of War, upon which there was a finding of guilty upon the general charge, and also upon the second specification thereof, with certain modifications and amendments.

CHARGE III. Of conduct unbecoming an officer and gentleman, in violation of the Sixty-first Article of War, upon which said charge there was a finding of guilty upon the general charge, and also upon ten specifications thereunder.

CHARGE IV. For embezzling, as defined in section 5488, Revised Statutes, in violation of the Sixty-second Article of War, and upon which said charge there was a finding of guilty upon the general charge, and also upon the first specification thereof.

The court-martial thereupon imposed the following sentence:

> And the court does therefore sentence the accused, Capt. Oberlin M. Carter, Corps of Engineers, U. S. A., to be dismissed from the service of the United States, to suffer a fine of $5,000, to be confined at hard labor at such place as the proper authority may direct for five years, and the crime, punishment, name, and place of abode of the accused to be published in the newspapers in and about the station and in the State from which the accused came, or where he resides.

The sentence was thereupon approved by the Secretary of War and confirmed by the President of the United States, on the 29th day of September, 1899, and the Secretary of War, upon whom devolved the necessary action for the execution of the said sentence, then declared that upon the date mentioned the appellant and plaintiff in error ceased to be an officer of the Army, and the United States penitentiary at Fort Leavenworth, Kans., was designated as the place of his confinement, where he was ordered to be sent, by the commanding general Department of the East, under guard.

Thereafter, on the 2d day of October, 1899, the appellant and plaintiff in error obtained from the circuit court of the United States for the southern district of New York a writ of habeas corpus commanding Gen. Wesley Merritt, the appellee and defendant in error herein, to have the body of the said Carter, together with the time and cause of his imprisonment and detention, before the said court on the 4th day of October, 1899. Upon the return of said writ the body of the appellant and plaintiff in error was produced before said court, and return made showing that the said appellant and plaintiff in error was detained in custody by authority of General Orders, No. 172, of September 29, 1899, being the order hereinbefore set forth, by authority of which said general order the appellee and defendant in error made return that the said appellant and plaintiff in error was not unlawfully detained, and prayed for dismissal of the writ. During the pendency of said habeas corpus proceeding before the said circuit court the appellant and plaintiff in error herein paid a fine provided for in said sentence.

Thereupon the circuit court dismissed the said writ and the appellant and plaintiff in error was remanded to the custody from which he was produced in conformity to Rule 34.

Thereafter an appeal was filed and a writ of error was granted and issued out of the United States circuit court of appeals for the second circuit, and the said circuit court for the southern district of New York, and the record and proceedings of said cause and all things concerning the same were sent to the said circuit court of appeals on the 20th day of November, 1899, and the said record and all proceedings thereunder and all things touching the same were duly certified to the said circuit court of appeals as aforesaid.

The said case on appeal came on to be heard in the United States circuit court of appeals on the 9th day of January, before Judges Wallace and Shipman, and on the 24th day of said month said court rendered a decision affirming the judgment of the circuit court below, with costs.

Thereafter, on February 5, 1900, a petition for a writ of certiorari in the cause to the circuit court of appeals was submitted to this court, which, on February 26, 1900, was denied. On the same day, February 26, this appeal was taken and writ of error sued out to review the order of the circuit court dismissing the writ of habeas corpus and remanding said Carter to the custody from which he was taken.

ARGUMENT.

I.

Error is not the proper remedy, and the writ should be dismissed. In re Neagle, 135 U. S., 1, 42; In re Morrissey, 138 U. S., 158.

II.

To entitle the appellant to take the appeal from the circuit court direct to this court, it must appear that the case comes under one or more of the provisions of section 5 of the act of Congress of March 3, 1891 (26 Stats., 826). This section reads as follows:

> That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court below for decision.
>
> From the final sentences and decrees in prize cases.
>
> Any cases of conviction of capital * * * crime.
>
> In any case that involves the construction or application of the Constitution of the United States.
>
> In any case in which the constitutionality of any law of the United States, or the validity or the construction of any treaty made under its authority, is drawn in question.
>
> In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.
>
> Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the

highest court of the State, nor the construction of the statute providing for review of such cases.

An examination of the assignments of error set out in this case for the purpose of ascertaining under which of the foregoing provisions the appeal might possibly be brought, and which must have been in the mind of the judge when he allowed the appeal and writ of error, shows that it is evidently the fourth subdivision of that section which is meant. This reads: "In any case that involves the construction or application of the Constitution of the United States." Certainly no other of the provisions of that section has the remotest relation to this case.

In order to give the Supreme Court appellate jurisdiction under the section of the act of March 3, 1891, above quoted, upon the ground that this case "involves the construction or application of the Constitution of the United States," a construction or application of the Constitution must have been expressed or requested in the circuit court below. This point was directly in issue in a case decided by the Supreme Court, in which the same clause of the act of Congress was construed.

In *Cornell* v. *Green* (163 U. S., 79) the court said:

> A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law

> of the United States is drawn in question—not incidentally, but necessarily and directly—that our jurisdiction can be invoked for that reason. An assignment of errors can not be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891. (*Ansbro* v. *United States*, 159 U. S., 695, 697, 698.)

See also *Muse* v. *Arlington Hotel Co.* (168 U. S., 435); *Carey* v. *Houston and Texas Central Railway* (150 U. S., 170, 181).

Examining the record in this case, there is no indication of anything like an intention on the part of the appellant to invoke the protection of the Constitution of the United States, except in the suggestion or legal conclusion in the seventh point of his petition for the writ of habeas corpus, which point reads as follows:

> That having suffered the punishment of dismissal and the degradation of the publication of the crime and punishment as imposed by said sentence, the imprisonment and detention of said Oberlin M. Carter is without authority of law, and the further punishment and detention of said Oberlin M. Carter and the carrying out of said sentence is contrary to law and the provisions of the Constitution of the United States, and is illegal.

There is no definite issue made here, no question raised, nor any statement made as to what particular provision of the Constitution was applicable or had been violated, and no definite ruling asked on any particular constitutional point; and no such point was decided or

touched upon by Judge Lacombe in his opinion when dismissing the writ of habeas corpus.

The statement of the appellant that the carrying out of the sentence is contrary to the provisions of the Constitution is an averment of a mere conclusion of law, and not a matter of fact, and there is nothing in the whole record from which a definite issue in respect to a constitutional question could be directly and distinctly deduced.

Taking into consideration the seventh point in the petition for a writ of habeas corpus, in connection with the whole circumstances and conditions surrounding this case, we fail upon the closest examination to discover what particular provision of the Constitution can legally be considered as having been involved in this case or claimed to be applicable. The appellant, however, in the third point of his assignment of errors, claims that the court erred in holding:

> That the said Oberlin M. Carter was not restrained in his liberty without due process of law, as required by the Constitution of the United States, and that he was not so detained contrary to the provisions of the said Constitution and the laws of the United States.

The seventh point of the same assignment of errors is on the same lines.

But these are mere assertions in which there is no merit, for the fifth amendment to the Constitution, in which the provision is found that "No person shall be deprived of * * * liberty * * * without due process of law," is a restriction upon the courts of the United States, but courts-martial are no part of the ju-

diciary of the United States, but simply an instrumentality of the Executive, and neither the fifth nor any other amendment of the Constitution affects the government of the land and naval forces.

Ex parte Milligan, 4 Wall., 123, 136, 137.
In re Bogart, 2 Saw., 407.

A trial by court-martial, therefore, while due process respecting those to whom it is applicable, is not that due process of law which the fifth amendment secures to every citizen in cases not arising in the land and naval forces.

While it is denied that any construction or application of the Constitution is presented in the record in this case, or that any provision of the Constitution could legally have arisen under the facts in this case, it is conceded that the military tribunals must keep within the limits of their legal authority, which, if it has been overstepped in the matter alleged in this case, is a question of the construction of the Statutes involved and not one presenting a case involving either the construction or application of the Constitution.

The whole case shows that it originally came before the circuit court of the United States, under section 752, Revised Statutes, upon the allegation that the appellant was restrained of his liberty in violation of the laws of the United States, and it was discussed before, presented to, and disposed of by the circuit judge upon the same lines, and not upon any constitutional questions.

III.

It is further maintained that even if the record exhibited a case coming under section 5 of the act of

March 3, 1891, the appellant has no right to have this case finally determined by the Supreme Court, because he heretofore elected to take his case to the circuit court of appeals by writ of error, under section 6 of the act cited, instead of taking it direct from the circuit court to the Supreme Court under an appropriate clause of section 5, if the same could be done.

This doctrine was held in the case of *Robinson* v. *Caldwell* (165 U. S., 359). That case was heard in the circuit court of the United States for the district of Idaho upon its merits, and judgment rendered for the plaintiff, and included the consideration of questions involving the construction of a treaty and the validity of an act of Congress. The defendant in the case was allowed an appeal direct to the Supreme Court. Pending this appeal, the defendant also prosecuted an appeal in the same case before the circuit court of appeals, which determined the case in favor of the plaintiff. This court also considered all the questions involving the construction of the treaty and the validity of the act of Congress. When subsequently the original appeal was heard by the Supreme Court, it was dismissed, the court holding that under the circumstances stated it could properly take cognizance of the case, in respect of any question involved in it, only upon certiorari. The opinion of the court is in part as follows:

> As the construction of a treaty made under the authority of the United States and the constitutionality of an act of Congress were drawn in question in the circuit court, this court could have taken cognizance of the case upon the appeal from the circuit

court, and determined upon those questions, and having thus acquired jurisdiction of the cause, it could have determined any question of the jurisdiction of the circuit court appearing upon the record, whether certified or not. (26 Stat., 826, c. 517, par. 5.) But the defendant elected to prosecute also an appeal to the circuit court of appeals, and that court considered and determined the whole case upon its merits.

It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals. As no question of jurisdiction was certified by the circuit court, and as the defendant chose not to wait the action of this court upon the appeal to it from the circuit court, but invoked the jurisdiction of the circuit court of appeals upon the whole case, he must be held to have waived his right to any decision here upon his direct appeal from the circuit court.

We are of opinion that the present appeal must be dismissed. After the final decree upon the merits in the circuit court of appeals, this court, under the circumstances stated, could properly take cognizance of the case, in respect of any question involved in it, only upon certiorari.

See also, May U. S. Supreme Court Practice, p. 465.
McLish v. *Roff*, 141 U. S., 661, 668.
United States v. *John*, 155 U. S., 109.
Chappell v. *United States*, 160 U. S., 499, 509.

The only differences between the case at bar and the facts in the case of *Robinson* v. *Caldwell* are, that the Supreme Court was appealed to in the latter case before appeal was made to the circuit court of appeals, while in the case at bar a writ of error is taken to the Supreme

Court subsequent to a final determination of the case by the circuit court of appeals against the appellant, and subsequent to a denial by the Supreme Court of his petition for a writ of certiorari.

The rule laid down in *Robinson* v. *Caldwell* has not been modified by the decision of this court in the case of *Pullman's Car Company* v. *Transportation Company* (171 U. S., 138). In that case an appeal from the judgment of the circuit court, based upon a constitutional ground, was taken direct to this court. There being doubt as to the jurisdiction of the Supreme Court, an appeal was also taken to the circuit court of appeals. Application was then made to this court for a writ of certiorari, directed to the circuit court of appeals, which was granted; so that the case was properly before this court, if not on appeal, then by certiorari.

It is to be observed from the language of the Supreme Court in the case of *United States* v. *John* and *Robinson* v. *Caldwell*, that the circuit court of appeals is not barred to hear and decide any of the questions arising in any cases involving the matter of jurisdiction, or the validity of a statute of the United States, or the construction or validity of a treaty, subjects specifically mentioned in section 5 of the act of March 3, 1891. Indeed, in the case of *United States* v. *John*, the court distinctly held that if any such questions are decided, a review of them by the Supreme Court could, when necessary, be obtained by certiorari.

It must not be forgotten that in addition to the remedy pursued in the circuit court of appeals, the appellant has also petitioned the Supreme Court for a writ of certiorari.

in which he set forth all the assignments of error now contained in the writ of error allowed by Judge Lacombe on February 26, 1900.

This petition was denied by the Supreme Court on the date just mentioned, subsequent to which the new proceedings were instituted looking to a hearing of the whole case before the Supreme Court of the United States upon writ of error and appeal, ignoring totally in these proceedings the fact that the case had been decided by the circuit court of appeals and had been before the Supreme Court upon the petition for a writ of certiorari.

From what has been said, it is submitted that sufficient grounds exist for a motion to dismiss the appeal and writ of error upon the grounds—

First, that the Supreme Court has no jurisdiction, in that the record does not disclose any case covered by section 5 of the act of March 3, 1891;

Second, that even if the record discloses a case coming under the section just stated, the appellant having elected to take his case to the circuit court of appeals, is barred from taking an appeal under the section quoted because it is not the purpose of the judiciary act of 1891 to give a party who is defeated in the circuit court of the United States, the right to have his case finally determined upon its merits both in the Supreme Court and in the circuit court of appeals.

Third, that the questions sought to be reviewed by the Supreme Court in the present appeal and writ of error have been submitted to it in the petition for a writ of certiorari, which petition was denied.

Fourth, that the record not showing any case arising under section 5, and the appeal having been taken to the circuit court of appeals under section 6 of the judiciary act of 1891, the judgment of the circuit court of appeals in this case is final and conclusive.

IV.

If, however, the court shall hold that it has jurisdiction of the appeal, it is submitted that the order appealed from should be affirmed, for the reasons stated in the opinion of the circuit court of appeals for the second circuit, printed in the appendix hereto.

J. K. RICHARDS,
Solicitor-General.

HENRY L. BURNETT,
United States Attorney.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

ROSE EX REL. CARTER, APPELLANT,
v.
ROBERTS, APPELLEE.

WALLACE, circuit judge:

This appeal presents for review an order of the circuit court of the United States for the southern district of New York dismissing a writ of habeas corpus. The writ was obtained in behalf of Oberlin M. Carter on a petition alleging that the relator was unlawfully imprisoned pursuant to a sentence of a court-martial.

It appears by the record that the relator, as a captain in the Corps of Engineers, United States Army, was convicted by the court-martial of four different offenses committed by him while in the military service of the United States, viz: Conspiring to defraud the United States, in violation of the Sixtieth Article of War; causing false and fraudulent claims to be made aganist the United States, in violation of the Sixtieth Article of War; conduct unbecoming an officer and a gentleman, in violation of the Sixty-first Article of War, and embezzlement, as defined

in section 5488, Revised Statutes of the United States, in violation of the Sixty-second Article of War. He was thereupon sentenced by the court-martial to suffer a fine of $5,000; to be imprisoned at hard labor for five years; to be dismissed from the service of the United States, and to the publication of his crime and punishment as prescribed by statute upon a dismissal for fraud. The findings and sentence of the court-martial were approved by the Secretary of War and confirmed by the President; and before the institution of the proceedings under review the relator had paid the fine imposed by the sentence, and had been dismissed from the service of the United States.

It is not the office of a writ of habeas corpus to perform the functions of a writ of error in reviewing the judgment of a court-martial. Courts-martial are tribunals created by Congress in pursuance of the power conferred by the Constitution, and have as plenary jurisdiction of offenses committed to them by the law military as do the circuit and district courts of the United States in the exercise of their statutory powers over other offenses. The question of jurisdiction may be reached by such a writ, as it may be when the judgment of any tribunal is attacked; but the range and scope of the inquiry is controlled by the same rules and limitations in either case. There must be jurisdiction to hear and determine, and to render the particular judgment or sentence imposed, but if this exists, however erroneous the proceedings may be, they can not be reviewed collaterally or redressed by habeas corpus. These principles have been repeatedly declared by the authorities. *In re Davidson* (21 Fed. Rep., 618); *Ex parte Reed* (100 U. S., 13); *In re Coy* (127 U. S., 731); *Ex parte Yarbrough* (110 U. S., 651); *United States* v. *Pridgeon* (153 U. S., 59).

It is not contended for the appellant that the court-martial did not have jurisdiction of the person of the

accused, and of the offenses of which he was convicted, but it is insisted that the court transcended its power in the imposition of punishment. More specifically, the contention for the appellant is that, while it was within the competency of the court-martial to try and punish the relator for the offenses in violation of the Sixtieth Article of War of which he was convicted, the court exceeded its authority when it punished him by fine and imprisonment instead of fine or imprisonment; and that the conviction and sentence for the offense alleged to be in violation of the Sixty-second Article of War were void because the facts charged did not constitute an offense against that article.

If the sentence was in excess of the authority conferred upon the court by the articles of war enacted by Congress it was to that extent void, as the court would have gone beyond its jurisdiction in imposing punishment. On the other hand, if the authority of the court extended to the punishment of the relator by fine and imprisonment upon his conviction of the two offenses in violation of the Sixtieth Article of War, the sentence defeats any remedy by the writ of habeas corpus, as that remedy reaches only cases of unlawful imprisonment, and it matters not for present purposes whether the authority of the court extended to his conviction and sentence for any other offense. There being no statutory direction upon the subject, usage permits an indefinite number of offenses to be adjudicated together in one proceeding by courts-martial, and the rendition of a single sentence covering all the convictions and imposing punishment accordingly, however separate and distinct may be the different offenses, and however different may be the punishments prescribed for them; 1 Winthrop, Military Law, 2d ed. (219, 614); Davis, Military Law (148, 689). It follows that if the sentence is warranted by a conviction of two

offenses, it is justified to the extent that such offenses are punishable.

The Sixtieth Article of War declares among other things that a person in the military service of the United States "who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance of any false or fraudulent claim," or "who makes, or causes to be made, any claim against the United States, or any officer thereof knowing such claim to be false or fraudulent," * * * "shall on conviction thereof be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge." The article, besides the two offenses mentioned, defines disjunctively eight others, and the language prescribing the punishment is contained in a concluding clause at the end of the enumeration. We entertain no doubt that the concluding clause is to be read distributively and applies to each of the ten enumerated offenses; and that a person convicted of two or more of the ten offenses is by its terms punishable for each by fine or by imprisonment, or by such other punishment as the court-martial may adjudge. Any other construction would attribute to Congress the intention to ignore any distinction between degrees of guilt in punishing crime, and to subject a person guilty of one offense to the same measure of punishment as one guilty of several or of all of the ten offenses.

As has been stated, the relator was convicted of two of the offenses defined by the Sixtieth Article of War. The record presents the charges and specifications upon which he was found guilty of those offenses. The charges describe each offense in the language of the article. Whether the specifications support the charges, or the evidence supports the specifications we are not at liberty to consider. Nor is it open to inquiry whether the two offenses were, in fact, but one and the same

criminal act. When properly constituted and convened a court-martial has jurisdiction to hear and determine the question whether the accused is guilty of any of the offenses created by the Articles of War. This jurisdiction necessarily includes the authority to decide, when the charge preferred against the accused is the commission of one or more of these offenses, whether the specifications and the evidence sufficiently exhibit the incriminating facts. As was said by the Supreme Court in *Dynes* v. *Hoover* (20 How., 65), the sentence (when confirmed by the President) "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had no jurisdiction over the subject-matter or charge, or one in which, having jurisdiction over the subject, it has failed to observe the rules prescribed by statute for its exercise." Having found the relator to be guilty of two offenses, the court was empowered by the statute to punish him as to one by fine, and as to the other by imprisonment. The sentence was not in excess of its authority.

It is proper to state that the other punishments imposed upon the relator by the sentence were authorized by the Articles of War. The conviction of conduct unbecoming an officer and gentleman was for an offense in violation of article 61; and that article requires that upon conviction the officer be dismissed from the service. The punishment by publication of his crime was authorized by article 100, which provides for such punishment when an officer is dismissed from the service for cause. It is also proper to state that Congress can, if it sees fit, carve out two or more offenses from a single criminal transaction, and impose cumulative punishments for the different offenses (*Commonwealth* v. *Trickey*, 95 Mass., 559; *United States* v. *Harmison*, 3 Sawyer, 556); and if the court-martial convicted the relator of several offenses

for a single criminal transaction it did not transcend necessarily the power conferred by the Sixtieth Article of War.

The appellant has urged the proposition that the relator, having been dismissed from the service, was not thereafter amenable to military authority. If by this it is meant to be said that he was no longer lawfully in custody under the sentence of imprisonment, the proposition has not sufficient color of merit to require discussion.

In dismissing the writ the court below expressed the opinion that the relator was properly convicted by the court-martial of an offense in violation of the Sixty-second Article of War, and that the sentence of imprisonment was supported by such conviction. Without intending to impugn the correctness of this conclusion, we have not considered the question, because in the view we have reached it does not arise. The relator was lawfully restrained of his liberty by the sentence and commitment pursuant to it, because the sentence was warranted both as to fine and imprisonment by his conviction of one offense subjecting him to punishment by fine, and of another subjecting him to punishment by imprisonment, and both in violation of the Sixtieth Article of War.

The order dismissing the writ of habeas corpus is affirmed, with costs.

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